MARBURY V. MADISON AND THE DOCTRINE OF JUDICIAL REVIEW.

WHAT is the *exact legal basis* of the power of the Supreme Court to pass upon the constitutionality of acts of Congress? Recent literature on the subject reveals a considerable variety of opinion. There are radicals who hold that the power owes its existence to an act of sheer usurpation by the Supreme Court itself, in the decision of *Marbury* v. *Madison*.[1] There are conservatives who point to clauses of the Constitution which, they assure us, specifically confer the power.[2] There are legists who refuse to go back of *Marbury* v. *Madison*, content in the ratification which, they assert, subsequent events have given the doctrine of that decision.[3] There are historians who show that a considerable portion of the membership of the body that framed the Constitution are on record as having personally favored judicial review at one time or another, either before, during, or after the Convention.[4] Finally, there are legal-historians who represent judicial review as the natural outgrowth of ideas that were common property in the period when the Constitution was established.[5] In the following article I accept this last view as in a general way the correct one. In doing this, however, I discover that I have only raised some further questions. For before ideas contemporary with the framing of the Constitution can be regarded as furnishing the *legal* basis of judicial review, it must be shown that they were, by contemporary understanding, incorporated in the Constitution, that they were regarded by the framers of the Constitution as furnishing judicial review, and that they were logically sufficient to do so. To investigate these questions is the purpose of the study to follow.

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[1] See, for instance, H. L. Boudin in 26 Polit. Sc. Qtly. 238.

[2] J. H. Dougherty in his recent volume follows Brinton Coxe in taking this position.

[3] This is the position taken by James Parker Hall in his Constitutional Law, and by Mr. Cotton in his "Introduction" to his Decisions of John Marshall.

[4] C. A. Beard, The Supreme Court and the Constitution. I have also seen an able article by Mr. Frank E. Melvin, Harrison Fellow at the University of Pennsylvania, continuing Prof. Beard's investigations. The article is about to be published, I believe, in the Am. Polit. Sc. Rev.

[5] A. C. McLaughlin, The Courts, the Constitution, and Parties; C. G. Haines, The American Doctrine of Judicial Supremacy. Before, however, any of the above mentioned works had appeared, the present writer had considered both the theoretical and historical grounds of judicial review at length and had arrived substantially at the conclusions which are emphasized in the following article. See 9 Mich. Law Rev. 102-25, 284-316.

I.

The position of those who are content to rest the power of the Supreme Court over acts of Congress upon *Marbury* v. *Madison*[6] is plainly illogical. For either that decision was based upon the Constitution or it was not. In the former case, however, it is the Constitution that is the real basis of the power, while in the latter the decision was erroneous by the court's own premises. Still it is urged that whatever the defects of the original decision, these have long since been cured by popular acquiescence and later decisions. Let me then begin this article by showing some difficulties in the way of this view.

The case of *Marbury* v. *Madison* arose upon an application by plaintiff to the Supreme Court for a writ of mandamus to the Secretary of State to compel him to deliver a commission authorizing plaintiff to exercise the functions of an office to which he had been duly appointed. The court, reversing the usual order of procedure, [6a] went first into the merits of the question and from its review of these came to the conclusion that a mandamus, had it been sought in a tribunal having jurisdiction of the case, would undoubtedly have been the proper remedy. But this, it continued, had not been done. For though §13 of the Act of 1789 purported to authorize the Supreme Court to issue "writs of mandamus in cases warranted by the principles and usages of law to . . . persons holding office under the authority of the United States,"[7] this provision transgressed Article III, §2, par. 2, of the Constitution, the words of which describing the original jurisdiction of the Supreme Court must be interpreted as negativing any further power of the same order. Thereupon the court pronounced §13 null and void, and dismissed the case for want of jurisdiction.

Inevitably, the first question raised by MARSHALL'S decision is as to the correctness of his construction of Article III, § 2, par. 2. In support of his position the Chief Justice might have quoted, had he chosen, the FEDERALIST,[8] but against him was: first, the important evidence of the legislative provision overturned, showing Congressional opinion practically contemporaneous with the Constitution; secondly, the fact that anterior to *Marbury* v. *Madison* the

[6] 1 Cr. 137 (1803).

[6a] On this point see 1 Cr. 91, 3 Cr. 171, 5 Cr. 221, 9 Wheat. 816, 10 Wheat. 20, 5 Pet. 190, 200.

[7] For the Act of 1789, see 1 Statutes at Large 85 ffg. (24 Sept. 1789, c. 20).

[8] Federalist No. 81 (Lodge's Ed., p. 507).

court itself had repeatedly taken jurisdiction of cases brought under that provision;[9] and thirdly, the fact that in other connections affirmative words of grant in the Constitution had not been deemed to infer a correlative negative. Thus, were the rule laid down in *Marbury* v. *Madison* to be followed, Congress would have power to enact penalties against only the crimes of counterfeiting, treason, and piracy and offences against the Law of Nations, whereas in fact it had, even as early as 1790, enacted penalties against many other acts, by virtue of its general authority under the "necessary and proper" clause.[10]

Yet it must be admitted that the rule of exclusiveness does often apply to cases of affirmative enumeration, so that the only question is whether Article III, §2, par. 2, furnished such a case. Speaking to this point, the Chief Justice said:[11] "A negative or exclusive sense must be given them [the words of the paragraph in question] or they have no operation at all." But this is simply not so. For though given only their affirmative value, these words still place the cases enumerated by them beyond the reach of Congress,—surely no negligible matter. Nor does the Chief Justice's attempt to draw support from the further words of the same paragraph fare better upon investigation. "In all other cases," he quotes, the Supreme Court is given appellate jurisdiction, that is, as he would have it, *merely* appellate jurisdiction. Unfortunately for this argument the words thus pointed to are followed by the words—which the Chief Justice fails to quote—"with such exceptions . . . as the Congress shall make." But why should not the exceptions thus allowed to the appellate jurisdiction of the Supreme Court, have been intended to take the form, if Congress so willed, of giving the court original jurisdiction of the cases covered by them?

Moreover, the time was to come when MARSHALL himself was to abandon the reasoning underlying the rule laid down in *Marbury* v. *Madison*. This rule, to repeat, was that the Supreme Court's original jurisdiction is confined by the Constitution to the cases specifically enumerated in Article III, §2, par. 2, and—though this was only dictum—that the court's appellate jurisdiction is confined "to all other cases." But now it must be noted that jurisdiction is always *either original or appellate*,—that there is, in other words, no third sort. The rule laid down in *Marbury* v. *Madison* becomes therefore the logical equivalent of the proposition that the Su-

[9] See argument of counsel in 1 Cr. 137-53.
[10] 1 Stat. L. 112 ff'g (Apr. 30, 1790).
[11] 1 Cr. 174.

preme Court had *only* original jurisdiction of the cases enumerated in Article III, § 2, par. 2. In *Cohens* v. *Virginia*[12] nevertheless the court took jurisdiction on appeal of a case which had arisen "under this Constitution," but was also a case to which a State was party, on the basis of the rule, as stated by the Chief Justice, that "Where the words admit of appellate jurisdiction the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court."[13] And in further illustration of this rule, the Chief Justice instanced the right of the Supreme Court to take jurisdiction on appeal of certain cases which foreign consuls were allowed to institute in the lower federal courts.[14] He also insisted, and quite warrantably, upon the necessity of the rule in question to major purposes of the Constitution. Yet obviously if the rule is to be harmonized with that laid down in *Marbury* v, *Madison,* it must be by eliminating the word "all" from the opening clause of Article III, §2, par. 2, and by inserting qualifying words in front of the word "those" of the same clause. Otherwise the line of reasoning taken in *Marbury* v. *Madison* is abandoned and the precise decision there left hanging in mid-air.[15]

Suppose however, we concede MARSHALL his construction of Article III, is his decision absolved of error thereby? By no means. This decision rests upon the assumption that it was the intention and necessary operation of §13 of the Act of 1789 to *enlarge* the original jurisdiction of the Supreme Court, and this cannot be allowed. To begin with, in Common Law practice, in the light of which §13 was framed, the writ of mandamus was not, ordinarily at least, an instrument of obtaining jurisdiction by a court, even upon appeal, but like the writs of habeas corpus and injunction, was a *remedy* available from a court in the exercise of its standing jurisdiction. This being the case, however, why may it not have been the intention of Congress in enacting §13, not to enlarge the Supreme Court's jurisdiction, but simply to enable the court to issue the writ

[12] 6 Wheat. 264 (1821).

[13] Ib. 395-402.

[14] The validity of such appeals was considered by C. J. Taney in Gittings vs. Crawford, Federal Cases, 5,465. Referring to the precise clause, under discussion in Marbury v. Madison, Taney said: "In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter." See also C. J. Waite's language in Ames v. Kansas, 111 U. S. 449.

[15] The precise precedent in Marbury v. Madison has been applied several times. See 5 How. 176, 1 Wall. 243, 8 Wall. 85.

of mandamus to civil officers of the United States as auxiliary to the original jurisdiction which the Constitution conferred upon it? It is certain that the court has more than once entertained motions by original suitors for injunctions to such officers,[16] and it is apparent that, so far as the question here discussed is concerned, an application for a writ of mandamus must rest on the same footing.[17]

Furthermore, the proposition that the writ of mandamus is not to be regarded ordinarily as a means of obtaining jurisdiction, but only of exercising it, was recognized and applied by the Supreme Court itself a few years later, in a case the exact parallel of *Marbury* v. *Madison*. By §14 of the Act of 1789 the circuit courts of the United States were given the power, in words substantially the same as those employed in §13, to issue certain writs "in cases authorized by the principles and usages of law." Yet in *McIntire* v. *Wood*,[18] where the issue was the validity of a writ of mandamus to a person holding office under the authority of the United States the Supreme Court ruled that before a circuit court could utilize the power given it in §14 in a case, it must have jurisdiction of the case on independent grounds, and the same rule was later reiterated in *McClung* v. *Silliman*.[19] But clearly, had the court followed this line of reasoning in *Marbury* v. *Madison*, it could not have questioned the validity of §13. Indeed, had it but followed the, today at any rate, well-known maxim of Constitutional Law that of two possible interpretations of a statute, the one harmonious with the Constitution, the other at variance with it, the former must be preferred,[20] it could not have challenged the legislation in question. By its view of Article III, §2, par. 2, it must still doubtless have declined jurisdiction of the case, but the ground of its action would have been, not the error of Congress, but the error of plaintiff.

In short there was no valid occasion in *Marbury* v. *Madison* for any inquiry by the court into its prerogative in relation to acts of Congress. Why then, it will be asked, did the court make such an inquiry? In part the answer to this question will appear later, but in part it may be answered now. To speak quite frankly, this de-

[16] Miss. v. Johnson, 4 Wall. 475; Ga. v. Stanton, 6 Wall. 50. The grounds on which these cases were dismissed do not affect the view urged in the text.

[17] Suppose Congress should transfer the business of interstate extradition to federal commissioners, as it would be within its power to do, there would be plenty of occasions when the Supreme Court would be asked for writs of mandamus to civil officers of the United States. See Ky. v. Dennison, 24 How. 65.

[18] 7 Cr. 504 (1813).

[19] 6 Wheat. 598 (1821).

[20] For a rather far-fetched application of this rule see the "Commodities Clause" Case, 213 U. S. 366 (1908).

cision bears many of the earmarks of a deliberate partisan *coup*. The court was bent on reading the President a lecture on his legal and moral duty to recent Federalist appointees to judicial office, whose commissions the last Administration had not had time to deliver, but at the same time hesitated to invite a snub by actually asserting jurisdiction of the matter. It therefore took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendent power.

II.

But from *Marbury* v. *Madison* we proceed to the question whether, and in what way, the Constitution itself sanctions judicial review. I have already indicated my opinion that no clause was inserted in the Constitution for the specific purpose of bestowing this power on courts, but that the power rests upon certain general principles thought by its framers to have been embodied in the Constitution. I shall now endeavor to justify this opinion.

That the members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it cannot be reasonably doubted. Confining ourselves simply to the available evidence that is strictly contemporaneous with the framing and ratifying of the Constitution, as I think it only proper to do, we find the following members of the Convention that framed the Constitution definitely asserting that this would be the case: GERRY and KING of Massachusetts, WILSON and GOUVERNEUR MORRIS of Pennsylvania, MARTIN of Maryland, RANDOLPH, MADISON, and MASON of Virginia, DICKINSON of Delaware, YATES and HAMILTON of New York, RUTLEDGE and Charles PINCKNEY of South Carolina, DAVIE and WILLIAMSON of North Carolina, SHERMAN and ELLSWORTH of Connecticut.[21] True these are only seventeen names out

[21] Max Farrand, Records of the Federal Convention (Yale Univ. Press, 1913): I, 97 (Gerry), 109 (King); II, 73 (Wilson), 76 (Martin), 78 (Mason), 299 (Dickincon and Morris), 428 (Rutledge), 248 (Pinckney), 376 (Williamson), 28 (Sherman), 93 (Madison); III, 220 (Martin, in "Genuine Information"). The Federalist: Nos. 39 and 44 (Madison), No. 78 (Hamilton). Elliot's Debates (Ed. of 1836); II, 1898-9 (Ellsworth), 417 and 454 (Wilson), 336-7 (Hamilton); III, 197, 208, 431 (Randolph), 441 (Mason), 484-5 (Madison); IV, 165 (Davie). P. L. Ford, Pamphlets on the Constitution, 184 (Dickinson, in "Letters of Fabius"). Ford, Essays on the Constitution, 295 (Yates, writing as "Brutus"). Pinckney later, in 1799, denounced the idea of judicial

of a possible fifty-five, but let it be considered whose names they are. They designate fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution,[22] and four of the five members of the Committee of Style which gave the Constitution final form.[23] The entries under these names, in the Index to FARRAND'S RECORDS occupy fully thirty columns, as compared with fewer than half as many columns under the names of the remaining members. We have in this list, in other words, the names of men who expressed themselves on the subject of judicial review because they also expressed themselves on all other subjects before the Convention. They were the leaders of that body and its articulate members. And against them are to be pitted, in reference to the question under discussion, only MERCER of Maryland, BEDFORD of Delaware, and SPAIGHT of North Carolina, the record in each of whose cases turns out to be upon inspection of doubtful implication. For while SPAIGHT, for instance, undoubtedly expressed himself, during the period of the Convention, as strongly adverse to the theory of judicial review,[24] yet he later heard the idea expounded both on the floor of the Philadelphia Convention and the North Carolina convention without protest. The words of BEDFORD which are relied upon in this connection are his declaration that he was "opposed to every check on the legislature." But these words were spoken with reference, not to judicial review, but to the proposition to establish a council of Revision.[25] MERCER of Maryland did not sign the Constitution and opposed its adoption. It is by no means impossible that one of the grounds of his opposition was recognition of the fact that the Constitution established judicial review.[26] Altogether it seems a warrantable assertion that upon no other feature of the Constitution with reference to which there has been considerable debate is the view of the Convention itself better attested.

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review, thus: "On no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or two, or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have any advocates in this country"; quoted from Wharton's State Trials, 412, by Mr. Horace A. Davis in Am. Polit. Sc. Rev., 551. Madison's later views are considered *infra*.

[22] Gorham, Rutledge, Randolph, Ellsworth, and Wilson.

[23] Johnson, Hamilton, Morris, Madison, and King.

[24] See McRee, Life and Correspondence of James Iredell, II, 169-76.

[25] Farrand I, 100, 106.

[26] Ib. II, 298.

Yet it must be admitted that, if we assume that the Convention did not finally incorporate its view in specific provisions of the Constitution, a difficulty that at first seems formidable opposes itself to the thesis that this view was secured by certain general principles thought to be embodied in the Constitution. The source of the difficulty I allude to is Article VI, par. 2, of the Constitution. This paragraph first announces the *supremacy* of the Constitution, the acts of Congress in pursuance thereof, and treaties made under the authority of the United States, as *law* of the land, and then proceeds to impose a specific mandate upon *State* judges to enforce this *supreme law,* anything in the law or constitution of any State to the contrary notwithstanding. The question therefore arises, Why did the Convention, if it believed general principles sufficient to secure judicial review of acts of Congress, deem it necessary to order the *State* judges to prefer what was described as *supreme* law of the land to subordinate law? Any doctrine of judicial review must rest in part upon the idea of one law superior to another, and if, to repeat the question just put, the fact of superiority of national law to State law furnished, in the estimation of the Convention, an insufficient security of the former as against the latter, why should not the analogous superiority of the Constitution itself to acts of Congress be similarly insufficient? But the answer to this question is, after all, plain enough: The judges to whom the mandate of Article VI is addressed are *State* judges, that is, judges of an independent jurisdiction. Their duty to take cognizance of national law *at all* had therefore to be declared in unmistakable terms. Indeed, once this fact is grasped, it is seen that the mandate in question, instead of opposing difficulty to the thesis I am presenting, furnishes it powerful confirmation. For the significant feature of that mandate now becomes the fact that it is addressed to State *judges,* who are thus assumed to be the *final* guardians of both State laws and State constitutions.

What, however, are the clauses usually represented as having been placed in the Constitution for the purpose of giving the Supreme Court the power to pass upon the validity of acts of Congress? One is the "pursuance" clause of Article VI, par. 2. But obviously this clause, while perhaps making more explicit the fact that Congress' is a limited power, says nothing as to what agency is to say *finally* what of Congress' acts are, and what are not, "in pursuance of this Constitution." Moreover, the "pursu-

ance" clause does not appear in Article III, where the judicial power of the United States is defined.

A clause more insisted upon, however, in this connection is the clause in this same Article III: "The judicial power of the United States shall extend to all cases arising under this Constitution." No doubt it must be allowed that cases involving the question of constitutionality with reference to acts of Congress are describable as "cases arising under this Constitution." Nevertheless, it must be insisted that the clause just quoted was not placed in the Constitution for the purpose of bringing such cases within the judicial power of the United States, and this for the simple reason that, *admitting the legal character of the Constitution,* they were already there. Thus we have just noted that the "pursuance" clause does not appear in Article III. But what this signifies is that the judicial power of the United States extends to *every* act of Congress whether made in pursuance of the Constitution or not; or, to quote the words of Chief Justice TANEY in *Ableman* v. *Booth,* that it "covers every legislative act of Congress, whether it be made within the limits of its delegated power or be an assumption of power beyond the grants in the Constitution."[27] Had, therefore, the clause "arising under this Constitution" been inserted to extend the judicial power of the United States to cases involving the constitutionality of acts of Congress, it would be so far forth mere surplusage.

The explanation of the clause must then be sought in a class of cases to which *but for it* the judicial power of the United States could not possibly extend, even assuming the legal character of the Constitution. Nor, relying upon the guidance of HAMILTON in the FEDERALIST is it difficult to discover such a class of cases. Construing the clause under discussion in FEDERALIST 80, HAMILTON explains that it refers to cases arising in consequence of *State* enactments transgressing prohibitions of the Constitution upon *State* legislative powers, cases of which, therefore, but for this clause, would terminate in the *State* judiciaries. HAMILTON'S explanation is confirmed by MADISON'S analysis of Article III in the Virginia convention[28] and by DAVIE'S language in the North Carolina convention,[29] but it is confirmed even more strikingly by the failure of the spokesmen for judicial review, while the Constitu-

[27] 21 How. 506, 519-20 (1858).
[28] Elliot, III, 484-5.
[29] Ib. IV, 165.

tion was pending, to adduce the clause in question in support of their position.

But there are also some objections of a more general character to resting the power of the Supreme Court over acts of Congress upon the phrases under discussion. For, if the framers wanted judicial review and still thought it necessary to provide for it specifically, why did they not choose language apt for the purpose, language as explicit and unmistakable as that describing, for example, the veto power of the President? A possible suggestion would be, of course, that they desired to conceal their intentions at this point, but the fact is, that they proclaimed them and that judicial review was universally regarded as a feature of the new system while its adoption was pending.[30] Moreover, their vagueness would have to be regarded as positively maladroit, since neither of the clauses just considered, taken by itself, secures the finality of the judicial view of the Constitution, which, however, is the very essence of judicial review. Furthermore, it may be queried, if these clauses are necessary to give the federal courts power to pass upon the constitutionality of acts of Congress, what becomes of the similar pretension of State courts with reference to State legislation under the State constitutions?

III.

We are accordingly driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary, in the same way as, for example, certain other general principles made unnecessary specific provision for the President's power of removal.[31] What, then, are these gen-

[30] See the evidence gathered by Mr. Horace Davis in the Am. Polit. Sc. Rev. for Nov., 1913. Mr. Davis himself, however, endeavors to reject the obvious verdict of this evidence. The explanation of his strange attitude is that he confuses the question of whether judicial review of acts of Congress was believed to be a feature of the new system with the questions whether it was expected to prove an effective limitation upon Congress. The absence of a Bill of Rights and the presence of the "general welfare" and "necessary and proper" clauses caused opponents of the Constitution to charge that the judges would never be able to stamp any act of Congress as invalid, that Congress' power was practically unlimited to begin with. See Elliot, I, 545; II, 314-15, 318, 321-2; IV, 175; also, McMaster and Stone, Pennsylvania and the Federal Constitution, 467, 611; also, Ford, Famphlets, 312; also and especially, Federalist No. 33.

[31] The parallel is exact. See Annals of Congress, I, cols. 473 ff'g and specially cols. 481-2.

eral principles? The task of identifying them is, perhaps, at this date not an entirely simple one. For while the ideas that are essential to explaining and sustaining judicial review *as a matter of law,* which are the ideas we are in quest of, are relatively few, they have to be sifted from a more considerable stock of ideas which contributed to the rise of judicial review, *as a matter of fact,* or which have since been offered with the aim of curtailing its practical operation. It will be profitable to begin by criticising some remarks by Professor MCLAUGHLIN in the course of his recent interesting study of the subject.

Thus, at the outset of his essay, writing with MARSHALL'S argument in *Marbury* v. *Madison* in mind, Professor MCLAUGHLIN states the doctrine of judicial review as follows: "In theory any court may exercise the power of holding acts invalid; in doing so, it assumes no special and peculiar role; for the duty of the court is to declare what the law is, and, on the other hand, not to recognize and apply what is not law." Further along, however, he sets himself the task of refuting the idea that the courts claim a superiority over the other departments in relation to the constitution, and we then find him writing thus: "This authority then in part arose ... from the conviction that the courts were not under the control of a co-ordinate branch of the government but entirely able to interpret the constitution themselves when acting in their own field." And from this it is quite logically deduced that, "If our constitutional system at the present time includes the principle that the political departments must yield to the decisions of the judiciary on the whole question of constitutionality, such principle is the result of constitutional development, and ..... of the acquiescence of the political powers, because of reasons of expediency." Yet at the same time it is conceded that the political departments must "accept as final" "the decision of the court in the particular case." Finally, it is urged that "no one is bound by an unconstitutional law."[32]

In other words, Professor MCLAUGHLIN presents the right of interpreting the constitution that is enjoyed by the courts first, as a *judicial* power, and therefore one to be exercised by courts *as such;* secondly, as a departmental or official function, and therefore one to be exercised by all departments of government equally, *including the courts;* and thirdly, as an individual prerogative, and therefore one belonging to everybody, *including judges.* In the

[32] **The Courts, the Constitution, and Parties, pp. 6, 51, 55, 56.**

first place, there is an element of inconsistency among these three theories that should not escape our attention. For if the power of the judiciary to construe the constitution, when acting in its own field, owes anything by way of *theoretical justification*—which is the point under discussion—to its position as an independent branch of the government, why is it necessary to insist on the legal character of the constitution and the duty of courts to interpret the law? Likewise, if the position of the judiciary as an equal and co-ordinate branch of the government, or of judges as governmental functionaries, is an indispensible foundation of judicial review, why is it necessary to contend that "no one is bound by an unconstitutional act"?

But a more important criticism is that the last two theories are either quite unallowable or totally insufficient to explain judicial review. Let us consider, first, the statement that "no one is bound by an unconstitutional law." This may mean one of two things: either that no one is bound by a law that has been determined by proper authority to be unconstitutional, which leaves open the crucial question as to where this proper authority resides; or, that no one is bound by a law which *he* thinks is unconstitutional, which is nonsense. It is not open to contradiction that judicial review posits a constitutional system, complete in all points, and furnished with the machinery for determining all questions that arise out of it. But the right of revolution is a right external to any constitution, and therefore to invoke it as a means of settling constitutional questions is to discard the constitution at the outset.[33]

And similarly is the doctrine that the power to construe the constitution is a departmental function allowable or unallowable according as one understands it. If what is meant by it is that all functionaries of government have to interpret the constitution preliminary to performing their supposed duties under it, in the same way that the private citizen has to interpret the ordinary law whenever he performs an act having legal consequences—why the theory is correct enough, but obviously quite insufficient to explain the finality of the judicial view of the constitution

[33] Vattel's Apothegm that the legislature cannot "change the Constitution without destroying the foundation of its authority" was a commonplace in Massachusetts before the Revolution. See the Massachusetts Circular Letter of 1768 in MacDonald, Documentary Source Book, 146-50. For interesting statements of basing judicial review on the right of revolution, see Elliot, II, 100-06 (Parsons in the Massachusetts convention), and IV, 93-4 (Steele in the North Carolina convention). See also note 58, below.

even in particular cases.[34] On the other hand, if what is meant is that the three departments have an equal right, when acting within their respective spheres, to determine the validity of their own acts, then it is untrue. This, of course, is apparent enough as respects the legislative department, for otherwise there would be no judicial review at all. It is true that the legislature is not arrested when it violates the constitution, that the only legal disadvantage it suffers is to have its acts disallowed, in the same way as the private citizen who makes a contract contrary to the statute of frauds or a will contrary to the rule against perpetuities has *his* act disallowed. But a statute that has been disallowed is usually harmless, and so the remedy is ordinarily quite adequate.

Still there are those who have asserted that the advantage which the judiciary enjoys over the legislature is due merely to the accident that in the scheme of law-making and law-enforcement provided by the constitution the judiciary has the later say, that it is, in other words, not one of *right* but of *position*.[35] The real test, therefore, of the departmental theory is supplied by the question whether it applies to the executive department, which occupies with reference to the judiciary the same favorable position that the latter does with reference to the legislature. JACKSON, in his famous Bank Veto Message of 1832, claimed, it will be recalled, the benefit of the departmental theory to the fullest extent. His claim was met by WEBSTER in the following terms: "The President is as much bound by the law as any private citizen ..... He may refuse to obey the law and so may any private citizen, but both do it at their own peril and neither can settle the question of its validity. The President may *say* a law is unconstitutional, but he is not the judge ..... If it were otherwise, there would be not government of laws, but we should all live under the government, the rule, the caprices of individuals; ..... The President, if the principle and reasoning of the message be sound, may either execute or not execute the laws of the land, according to his sovereign pleasure. He may refuse to put into execution one law, pronounced valid by all branches of government, and yet execute another which may have been by constitutional authority pronounced void." In brief, WEBSTER concluded, the message converted "constitutional limitations of power

[34] In an early Massachusetts case C. J. Parker has some very sensible words on this subject. At the moment of writing, however, I am unable to recover the reference.

[35] Madison took this position tentatively in 1788; Letters and Other Writings, I, 195 (1865). His words on this occasion are considered *infra*. Cf Federalist No. 49.

into mere matters of opinion," denied "first principles," contradicted "truths heretofore received as indisputable"; *for it denied "to the judiciary the interpretation of the law."*[36] And he elsewhere inquired, with pertinent reference to a then impending issue: "Does nullification teach anything more revolutionary."[37]

The fact of the matter is that, while the principle of the independence and equality of the departments fortifies each department in the possession and use of the powers belonging to it, *it throws no light whatsoever upon the question as to what those powers are,* and that therefore it cannot be validly drawn to the support of judicial review. Moreover, we discover that at the critical moment Professor McLAUGHLIN abandons this principle. For, as we have seen, he admits that the political departments are obliged "to accept as final ..... the decision of the court in the particular case." Yet he also contends that further acquiescence by these departments in the decisions of the judiciary on constitutional questions is not required by constitutional theory, but must be reckoned as "accommodation" on the part of these departments, based on reasons of expediency. With this contention I cannot agree. On the contrary, it seems to me that once we accept the doctrine of judicial review as a part of the constitution, the acquiescence of the political departments in the judicial view of the constitution is required by the constitution itself. The question at issue may be put in this way: Is the legislature bound by judicial interpretations of the constitution arising from past cases, when passing laws intended to govern future cases? It seems to me that there can be no doubt that it is, if the phrase "passing a law" be given its proper significance of endowing a legislative measure with the sanction and force of *law.* For this latter the legislature is simply incapable of doing when the measure runs counter to settled judicial interpretation of the constitution, unless it possesses a constructive power over-riding that of the courts, which, however, would mean the end of judicial review. By the theory of judicial review a measure of the character described, although it may have been put through all the parliamentary stages, is not *law* and never was. Indeed, this result flows from Professor McLAUGHLIN'S own proposition that the courts do not "assume any special and peculiar role" in relation to the constitution, different, that is, from their role in relation

[36] Speech of July 11, 1832.
[37] Works (National Ed.), II, 122 (Oct. 12, 1832).

to the ordinary law. In both cases alike the courts are interpreting the law; and if those subject to the ordinary law are bound by the judicial interpretation of *it*, then those subject to the constitution are bound by the judical interpretation of *it*. The unique element of the latter case is merely the fact that in the constitution we have a law that binds the government itself.[38]

It is therefore submitted that judicial review rests upon the following propositions and can rest upon no others: 1—That the constitution binds the organs of government; 2—That it is law in the sense of being known to and enforceable by the courts; 3—That the function of interpreting the standing law appertains to the courts alone, so that their interpretations of the constitution as part and parcel of such standing law are alone authoritative, while those of the other departments are mere expressions of opinion. That the framers of the Constitution of the United States accepted the first of these propositions goes without saying. Their acceptance of the second one is registered in the Constitution itself, though this needs to be shown. But it is their acceptance of the third one which is the matter of greatest significance, for at this point their view marks an entire breach, not only with English legal tradition, but, for the vast part, with American legal tradition as well, anterior to 1787.

[38] A very explicit statement of the doctrine of departmental construction is that of Abraham Baldwin in the United States Senate, Jan. 23, 1800; Farrand, III, 383. For Jefferson's view as formulated late in life, see his Writings (Mem. Ed.), XV, 212 ff'g. Madison as President took the position that he had no discretion in the matter of enforcing, not only decisions of the judiciary, but acts of Congress: Am. St. Papers, Misc. II, 12 (1809). Jackson, on the other hand, is credited with the sentiment, with reference to Worcester v. Ga. (6 Pet. 515): "John Marshall has made his decision, now let him enforce it"; Greeley, American Conflict, I, 106. Lincoln's views expressed in criti cism of the Dred Scott decision are contradictory. Prof. McLaughlin refers approvingly to old Gideon Welles' attempt "to make General Grant see that he was not under constitutional obligation to obey an act if that act was unconstitutional. Grant maintained that he was under obligations to obey a law until the Supreme Court declared it unconstitutional. Such is the natural position of the layman." The illustration, however, falls down at the critical point, for even Welles had no idea of maintaining that the President would not be bound by a decision of the Supreme Court: Diary of Gideon Welles, III, 176-80. Furthermore, on the precise question in issue between Welles and Grant, I must express a preference for the views of the latter. Obedience to the mandates of the legislature till they are proved to be void is one of the risks of office under our system. The contrary view leads to irresponsibility and disorder. Bancroft, in his History, supports Prof. McLaughlin's view on page 350 (Last Revision): "The decision of the Court in all cases within its jurisdiction is final between the parties to a suit and must be carried into effect by the proper officers; but as an interpretation of the Constitution, it does not bind the President or the Legislature of the United States." This view is stated *ex cathedra* and without any attempt at argument, and three pages later (p. 353) is substantially contradicted. The position taken by President Taft and Congress with reference to the proposal to enact an income tax in the face of Pollock v. Farmers' Loan and Trust Co. (158 U. S.) is fresh in mind.

IV.

The idea of judicial review is today regarded as an outgrowth of that of a written constitution, but historically both are offshoots from a common stock, namely the idea of certain fundamental principles underlying and controlling government. In Anglo-American constitutional history this idea is to be traced to feudal concepts and finds its most notable expression in Magna Carta.[39] The notion was well suited to a period when the great institutions of mankind were thought to be sacred, permanent, immutable, and did in fact alter but slowly. The period of the Reformation, however, was a period of overturn, of defiance of ancient establishments, of revolution. Its precipitate for political theory was the notion, derived from Roman law, of *sovereignty*, of human authority in the last analysis uncontrollable, and capable accordingly of meeting the exigencies of the new *regime* of Change.

But where did sovereignty rest? Sir Thomas SMITH, in his COMMONWEALTH OF ENGLAND,[40] reflecting Tudor ideas, attributed it to the Crown in Parliament, and it is not impossible that English political theory would have remained from that day to this substantially what it is today but for the attempt of James STUART to set up the notion, on the basis of Divine Right, of a kingly prerogative recognized but uncontrolled by the Common Law. The result was a reaction headed by Sir Edward COKE and having for its purpose, to quote the quaint words of Sir Benjamin RUDYARD, "to make that good old, decrepid law of Magna Carta, which hath so long been kept in and bed-ridden, as it were, to walk again."[41] COKE took the position that there was no such thing as sovereign power in England, even for Parliament; for, said he: "Magna Carta is such a fellow as will have no sovereign." His famous dictum in *Dr. Bonham's Case*[42] that an act of Parliament "contrary to common right and reason" would be "void," was therefore quite in harmony with his whole propaganda. At the same time, it would be the height of absurdity to suppose that these words necessarily spell out anything like judicial review. They undoubt-

[39] See C. H. McIlwain, The High Court of Parliament and Its Supremacy; and G. B. Adams, The Origin of the English Constitution.

[40] F. W. Maitland, Constitutional History, 255. Maitland expresses the emphatic opinion that the law-making power of Crown and Parliament was from an early date unlimited.

[41] Cobbett, Parliamentary History, II, col. 335; the remark quoted below is from the same debate.

[42] 8 Reps. 107, 118 (1612).

edly indicate COKE'S belief that the principles of "Common right and reason," being part of the Common Law, were cognizable by the judges while interpreting acts of Parliament. But for the rest they must be read along with COKE'S characterization of Parliament as the "*Supreme* Court" of the realm. As he plainly indicated by his connection with the framing of the Petition of Right, COKE regarded Parliament itself as the final interpreter of the law by which both it, the King, and the judges were bound.

But it is the tendency of doctrines to strip themselves, so to speak, for action or else to disappear. A contemporary of COKE'S, HOBART, early gave the dictum in *Bonham's Case* an interpretation which, had it been followed, might have meant something very like judicial review.[43] HOBART'S doctrine in turn found its way to America through BACON'S ABRIDGEMENT, where OTIS found it an available weapon for the moment in the *Writs of Assistance Case* in 1761.[44] More than a century before this, however, the English judges in *Streater's Case*[45] had decisively repudiated the dictum, while early in the 18th century Lord HOLT, minded to give his predecessor's words some meaning, had reduced their application to the single case where an act of Parliament should be so self-contradictory in terms as to be impossible of execution.[46] Just as the Americans were about to frame their first constitutions, HOLT'S doctrine found its way to them in the influential pages of BLACKSTONE,[47] in company with the notion of legislative sovereignty. Its initial effect, in co-operation with other influences, was to give judicial review a set-back, though finally it was to furnish the way of return thereto. Undoubtedly the most influential case in which judicial review was broached before the Convention of 1787 was that of *Trevett* v. *Weeden*,[48] in which

[43] Savadge v. Day, Hob. 85 (1615).

[44] See my "Establishment of Judicial Review" in 9 Michigan Law Review 104-06. For the spread of the influence of Otis' argument, see the case of Robin v. Hardaway, Jefferson's Reports, 114. Professor McMaster informs me that in 1765 the Stamp Act was declared unconstitutional by the County Court of Northampton County, Va.

[45] 5 State Trials 386 ff'g. (1653).

[46] City of London v. Wood, 12 Mod. 669 (1701).

[47] 1 Comms. 91. The case discussed by Hobart, Holt, and Blackstone in turn is that of an act of Parliament making a man a judge in his own case. Such an act, says Hobart, would be against the laws of nature and void, but Holt and Blackstone merely say it would be self-contradictory. The discussion starts with Coke's citation of a case arising in the manor of Dales, where it was held merely that an act of Parliament conferring in general terms upon a specific person the jurisdiction of cases arising in the manor did not apply to a case to which that person was an interested party: 8 Rep. 118-20.

[48] J. B. Thayer, Cases on Constitutional Law, I, 73-8; Brinton Coxe, Judicial Power and Unconstitutional Legislation, 234-48.

in 1786 the Rhode Island judges refused enforcement to a rag-money law on account of its alleged "repugnancy," that is self-contradictory character.

The influence of BLACKSTONE, however, in excluding judicial review from the early State constitutions was subordinate to two other considerations: first, uncertainty whether these constitutions were law, and secondly, the position of the legislature in them. There could, of course, be no doubt that the fundamental principles of right and reason invoked by COKE were law, since they were part and parcel of the Common Law. They were, therefore, known to the judges and enforceable by them, at least as principles of interpretation in applying statute law. But the early State constitutions were of a different stamp,—they were acts of revolution, social compacts, sprung from the pages of LOCKE rather than of COKE. Undoubtedly they illustrated and realized the doctrine that all just government rests upon the consent of the governed. Yet it was a corollary from this doctrine, that a government established upon this foundation had the right to *govern,* and that this was recoverable by the people only by another act of revolution. The power of *enacting laws,* however, was a function of *government.* How, then, could constitutions, bills or rights, frames of government, the work of the people themselves, be regarded as laws in the strict sense of the term? Their moral supremacy none doubted, nor yet that a breach of them by government destroyed its right to be, but until the *people* should be regarded as having an *enacting power,* exercisable directly and without the intervention of their legislative representatives, the *supremacy* of constitutions was a real barrier to their *legality.*[49]

But the second difficulty was even more formidable. A majority of the early State constitutions contained statements, sometimes in very round terms, of MONTESQUIEU'S doctrine of the separation of powers; and as against executive power, a supposed monarchical tendency in which was feared, this principle was given detailed application.[50] Not so, however, as against legislative

[49] On a constitution as an act of revolution, see the remarks of the judges in Kamper v. Hawkins, Va. Cases 20, ffg.; also, Marshall in Marbury v. Madison. On the lodgment of the function of governing exclusively with the government, see Luther Martin's remarks in his "Genuine Information"; also, Dr. Benjamin Rush's remarks in his "Address to the People of the United States" (1787) in Niles' Principles and Acts of the Revolution, 234-36. The idea, indeed, is fundamental to the concept of representative government.

[50] See data in Federalist Nos. 47 and 48.

power.[51] In the first place, all through colonial times, the legislature had stood for the local interest as against the imperial interest, which had in turn been represented by the governors and the judges. In the second place, the legislative department was supposed to stand nearest to the people. Finally, *legislative* power was *undefined* power. As applied against the legislative department, therefore, all that the principle of the separation of powers originally meant was that those who held seats in the legislature should not at the same time hold office in either of the other departments.[52] But the legislature itself, like the British Parliament and like the colonial legislatures before it, exercised *all kinds of power*, and particularly did it exercise the power of interpreting the standing law and interfering with the course of justice as administered in the ordinary courts;[53] and the only test deemed available to its acts was that they should be passed in the usual

[51] The position of the legislature in the early State constitutions is described at length by Morey, in Annals of the Am. Acad. of Soc. and Polit. Sc., IX, 398 ffg; also by Davis, "American Constitutions" in Johns Hopkins University Studies, 3rd Series.

[52] The doctrine of the separation of powers receives recognition in the body of the first Virginia constitution in the following words: "That the legislative, executive, and judiciary departments shall be distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time," etc. See also the first New Jersey Constitution, Art. XX; the original North Carolina Constitution, Arts. XXVIII-XXX; the first Pennsylvania Constitution, Sec. 23; the first South Carolina Constitution, Art. X: Thorpe, Am. Charters, Constitutions, etc.

[53] For Parliament's relation to the standing law in the 17th century, see the instructive pages in McIlwain, High Court of Parliament, etc., Ch. III, especially pp. 109-66. Said Harrington in his Oceana: "Wherever the power of making law is, there only is the power of interpreting the law so made"; loc. cit. 163. See also Blackstone, 1 Comms. 160. For the case of the colonial legislatures, see Works of James Wilson (Andrews' Ed.), II, 50; Minot, History of Massachusetts, I, 29; Hutchinson, History of Massachusetts, etc., I, 30, II, 250, 414; 15 Harvard Law Rev. 208-18; Massachusetts Acts and Resolves (to 1780), passim; Journal of Virginia House of Burgesses, passim. For the case of the early state legislatures, see Federalist Nos. 48 and 81, the latter of which is quoted *infra* on this subject. See also Jefferson's "Virginia Notes" in Works (Mem. Ed.) II, 160-78; also the Reports of the Pennsylvania Council of Censors of their sessions of Nov. 10, 1783, and June 1, 1784, in The Proceedings Relative to the Calling of the Conventions of 1776 and 1790, etc. (Harrisburg, 1825), pp. 66-128. See also Langdon of New Hampshire's letters complaining of acts of the state legislature annulling judgments, in New Hampshire State Papers, XI, 812, 815, and XXII, 749, 756 (June, 1790). For concrete instances in Massachusetts under the Constitution of 1780, see Acts and Resolves under following dates: 1780, May 5, June 9, Sept. 19; 1781, Feb. 12, Apr. 28, Oct. 10; 1782, Feb. 13, 22, Mar. 5, 7, May 6, 7, June 7, 18, Sept. 11, Oct. 4, Nov. 2; 1783, Feb. 4, 25; Mar. 17, Oct. 11; 1784, Feb. 3; 1785, Feb. 28, Mar. 17; 1786, June 27, J'ly 5; 1787, Feb. 26, Mar. 7, J'ly 7; 1790, Feb. 25, 26, Mar. 9; 1791, Feb. 24. See also Kilham v. Ward *et al.*, 2 Mass. 240, 251; also, Proceedings of the Massachusetts Historical Society, for 1893, p. 231; also Story's Commentaries, § 1367. Further testimony will be found in a speech by Roger Sherman in his contemporary essays on the Constitution; Moore's History of North Carolina; Jeremiah Mason's Memories, etc.; Tucker's Edition of Blackstone (1802), the appendix; Flumer's Life of Wm. Plumer; various judicial his-

form.[54] In short, as both MADISON and JEFFERSON put the matter later, legislative power was the *vortex* into which all other powers tended to be drawn. Obviously so long as this remained the case, there could be nothing like judicial review.

The period 1780-1787, however, was a period of "constitutional reaction," which mounting gradually till the outbreak of Shays' Rebellion in Massachusetts in the latter part of 1786, then leaped suddenly to its climax in the Philadelphia Convention. The reaction embraced two phases, that of nationalism against State sovereignty, that of private rights against uncontrolled legislative power; but the point of attack in both instances was the State legislature.[55] Yet it should not be imagined for a moment that those who discerned the central fault of "the American political system" gave themselves over merely to idle lamentation. Fortunately no one contended at that date that the existing American constitutions, wrought out as they had been under the stress and urgency of a state of warfare, were impossible of improvement.[56] Fortunately, too, American political inventiveness had by no means exhausted itself in its first efforts at constitution-building. Upon this latent talent the problems of the times acted as incentive and stimulant, eliciting from it suggestion after suggestion which it needed but the ripe occasion to erect into institutions composing a harmonious whole. Some of these suggestions it is pertinent to enumerate: (1) from Massachusetts and New Hampshire came

tories of Rhode Island, where the practice continued till 1842. The published Index to Rhode Island legislation to 1842 is immensely instructive in this connection. See also such cases as Rep. v. Buffington, 1 Dall. 61; Calder v. Bull, 3 Dall. 386; Watson v. Mercer, 8 Pet. 88; Satterlee v. Matthewson, 2 Pet. 380; Wilkinson v. Leland, *ib.* 657. The overturn of this practice through a new interpretation of the principle of the separation of powers is traced *infra*. See also my article in the February number of this Review on the Doctrine of Vested Rights. (12 Mich. Law Rev. 247-276.)

[54] Consider, for example, Jefferson's words in his "Virginia Notes" (cited above): It is needless for the executive or the judiciary to attempt to oppose the legislature, he says, for then "they put their proceedings into the form of acts of assembly, which will render them obligatory on the other branches."

[55] See criticisms passed in the Convention on the notion that the States were sovereign under the Articles of Confederation, in Farrand I, 313-33, 437-79. See also the present writer's National Supremacy, Ch. III (Holt & Co., 1913). For the revolt against legislative oppression of private (property) rights, see the elaborate criticism of the recent product of the State legislatures by Madison in 1786, Writings (Hunt Ed.), II, 338 ff'g. Also, see his statement on the floor of the Convention, June 6, and afterwards repeated by him elsewhere, that "the necessity of providing more effectually for the security of private rights and the steady dispensation of justice" was one of the objects of the Convention. "Interferences with these," he declared, "were evils which had, more perhaps than anything else, produced this Convention. Was it to be supposed that republican liberty could long exist under the abuses of it practised in some of the States?" See also Federalist Nos. 10 and 54.

[56] See Jefferson's apologia in his Virginia Notes, above cited; also Rush's "Address" in Principles and Acts, 234-36.

the idea of an ordered and regular procedure for making constitutions, with the result inevitably of furthering the idea of an enacting power in the people at large and that of the legal character of the constitution;[57] (2) from New Jersey, Connecticut, Virginia, New Hampshire, and Rhode Island came the idea of judicial review, partly on the basis of the doctrine of the right of revolution and partly on the basis of the doctrine of certain principles fundamental to the Common Law that had found recognition in the State constitutions;[58] (3) from North Carolina, just as the Philadelphia Convention was assembling, came the idea of judicial review based squarely on the written constitution and the principle of the separation of powers;[59] (4) from various sources came the idea that legislative power, instead of being governmental power in general, is a *peculiar kind of power*;[60] (5)

[57] On the making of the revolutionary State constitutions, see Davis in Johns Hopkins University Studies, 3rd Series, pp. 516 ff'g. The legal character of the Massachusetts constitution of 1780 was recognized and enforced by the supreme court of the State in a series of decisions, in 1780-81, pronouncing slavery unconstitutional. See G. H. Moore, History of Slavery in Massachusetts. The writers on the subject of judicial review seem not to have discovered the importance of these cases.

[58] The New Jersey case referred to is Holmes v. Walton, 1780, on which see Austin Scott in the Am. Hist. Rev., IV. 456 ff'g. The case dealt with the question of trial by jury. The legislature complied with the court's view of the matter only very incompletely. The Connecticut case is the Symsbury Case, 1785, to which I first drew attention in my "Establishment of Judicial Review." The case, which is reported in Kirby (Conn.), 444 ffg., dealt with the subject of vested rights. The Virginia case is Com. v. Caton, 1782 (4 Call 5), which is important for the dicta. However, it should be noted that the much quoted words of Chancellor Wythe in this case deal with the question of the duty of the court in the face of an attempt by one chamber of the legislature to usurp power, not that of its duty in face of a void act of the whole legislature. The case of Josiah Phillips, which Professor Trent tries to make out a precedent in this connection (Am. Hist'l Rev., I, 444 ff'g) is no precedent. Phillips was finally proceeded against in the regular way, rather than under the bill of attainder that had been voted against him because it was contended in his behalf that he was a British subject and, therefore, not capable of treason against Virginia. This is Jefferson's explanation of the matter, given repeatedly, and he was governor at the time. The mythical view of the case derives its chief support from a passage in Tucker's Blackstone, I, 293 (App.), cited by Haines, p. 79. See also my article in 9 Mich. Law Rev. The Rhode Island case is Trevett v. Weeden. "The sole power of judging of the laws," said Varnum, belongs to the courts. The New Hampshire case is referred to in Plumer's Life of Wm. Plumer and in Jeremiah Mason's Memories, but I cannot furnish the citations at this writing. It dealt with the subject of vested rights. The much cited case of Rutgers v. Waddington marked, as I point out in 9 Mich. Law Rev., a triumph for the notion of legislative sovereignty.

[59] Bayard v. Singleton, 1 Martin 42. See note 24, above. Mr. W. S. Carpenter finds from the contemporary newspapers that this case was decided in May, several days before the Philadelphia Convention had actually come together.

[60] See, in this connection, the Reports of the Pennsylvania Censors, referred to in note 53, above. The earliest statement of the respective limits of legislative and judicial powers came from the royal governors, in an effort to check the former. See, for example, the message of Gov. Fletcher to the New York Assembly, Apr. 13, 1695: "Laws are to be interpreted by the judges," *i. e.*, the judges alone: Messages from the Governors

from various sources came the idea that judicial power, exercised as it habitually was under the guiding influence of Common Law principles, was naturally conservative of private rights;[61] (6) from various sources came the idea that the judiciary must be put in a position to defend its prerogative against the legislative tendency to absorb all powers, and this idea was connected with the idea of judicial review both in the relation of means and of end;[62] (7) from the Congress of the Confederation came the idea that the Articles of Confederation and treaties made under them were rightfully to be regarded as part and parcel of the law of every state, paramount, moreover, to conflicting acts of the State legislatures and enforceable by the State courts.[63] Probably no one public man of the time shared all these ideas when the Philadelphia Convention met. But the able membership of that famous body was in a position to compare views drawn from every section of the country. Slowly, by process of discussion and conversation, these men, most of them trained in the legal way of thinking, discovered the intrinsic harmony of the ideas just passed in review; discovered, in other words, that the acceptance of one of them more or less constrained the acceptance of the others also, that each implied a system embracing all.

The Virginia Plan, introduced into the Convention at its outset, provided for the three departments of government. On the other hand, the same plan gave evidence that its authors had but

(of New York) (Lincoln, Ed.), I, 55. For later gubernatorial messages on the same subject, see ib. II, 250 (Apr. 27, 1786), and IV, 532 ffg (Apr. 10, 1850). For some early judicial statements of the motion, see Bayard v. Singleton; also Ogden v. Witherspoon and Ogden v. Blackledge, discussed below. Some later cases on the point are 5 Cow. (N. Y.) 346; 99 N. Y. 463; 159 N. Y. 362. See also Cooley, Constitutional Limitations (2nd Ed.), 173-5.

[61] For the reception accorded Trevett v. Weeden, see McMaster, History, I 338 ff'g. At this same time Wm. Plumer was writing (1786): "The aspect of public affairs in this State is gloomy * * * Yet even in these degenerate days, our courts of law are firm," etc.:: Life of Wm. Plumer, p. 166. It was at this time that the worship of the judiciary began, which was later to become so conspicuous a feature of the Federalist regime, leading indeed to the belief on the part of the judges themselves, that they were meant to be the moral guardians of society. See Henry Jones Ford, Rise and Growth of American Politics, 112-13.

[62] See the criticism by the Pennsylvania Council of Censors (Nov., 1783) against the existing State Constitution: "Because if the assembly should pass an unconstitutional law and the judges have the virtue to disobey it, the same could instantly remove them": loc. cit., p. 70. See also, Hamilton in Federalist Nos. 78 and 80; also infra on the debate of 1802. Madison's anxiety for judicial independence of legislative influence was extreme: Farrand II, 44-5.

[63] Secret Journals of Congress (1821), IV, 185-287; Journals of Congress (1801), XII, under dates of Mar. 21 and Apr. 13, 1787. See also, Bayard v. Singleton (supra) and Writings of Jefferson (Mem. Ed.), VI, 98.

imperfect recognition of the implications of the doctrine of the separation of powers, for it associated members of the judiciary in a council with the executive to revise measures of the national legislature and it left to the the national legislature the task of keeping State legislation subordinate to national powers. The first important step in the clarification of the Convention's ideas with reference to the doctrine of judicial review is marked, therefore, by its rejection of the Council of Revision idea on the basis of the principle stated perhaps most precisely by STRONG of Massachusetts, "That the power of *making* ought to be kept distinct from that of *expounding* the laws." "No maxim," STRONG added, "was better established," and the utterances of other members bear out his words.[64] For, in one form or another, the notion of legislative power as *inherently limited power,* distinct from and exclusive of the power of interpreting the standing law, was reiterated again and again and was never contradicted. When, therefore, the Convention adopted Article III of the Constitution vesting "the judicial power of the United States in one Supreme Court and such inferior courts as Congress shall from time to time establish," it must be regarded as having expressed the intention of excluding Congress from the business of law-interpreting altogether.

But a not less important step toward the final result was taken when the idea of a Congressional veto of State Laws was dropped and for it was substituted the Small State proposition of giving the Constitution the character of supreme law within the individual States enforceable by the several State judiciaries.[65] Thus it was settled that as against State legislation at any rate the Constitution should be *legally* supreme. Why not then as against national legislation as well? When it was decided that the Constitution should be referred for ratification to conventions within the States, the question was probably determined for the majority of the members. Said MADISON: "A law violating a constitution established by the people themselves would be considered by the judges as null and void.[66] Later the Convention

[64] Farrand II, 73-80.

[65] Note particularly the significance of Sherman's words with reference to Congressional veto: "Such a power involves a wrong principle, to wit, that a law of a State contrary to the Articles of Union would, if not negatived, be valid and operative." Yet as late as Aug. 23, John Langdon of New Hampshire said: "He considered it [the question of a Congressional veto] resolvable into the question whether the extent of the National Constitution was to be judged of by the State governments": Farrand II, 391. The "arising" clause was adopted Aug. 27.

[66] Farrand, II, 93.

proceeded to insert in the Constitution prohibitions upon Congressional power in the same terms as some of those already imposed upon State legislative power.[67] The conclusion is unescapable that when Article VI, par. 2, designates the Constitution as *law* of the land in the same terms as it does acts of Congress made in pursuance of it, it does so by virtue of no inadvertence or inattention on the part of its framers. Moreover, as noted before, the same paragraph recognizes State constitutions as known to and enforceable by State courts.

But then was it upon the premises thus provided that the Convention did actually base its belief in judicial review of acts of Congress? The answer to this question is indicated in part by the fact that the function of judicial review is almost invariably related by the members of the Convention to the power of the judges as "expositors of the law." But a better rounded and a more satisfactory answer is furnished by HAMILTON'S argument in FEDERALIST 78: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference between the two, to prefer the will of the people declared in the Constitution to that of the legislature as expressed in statute." It cannot be reasonably doubted that HAMILTON was here, as at other points, endeavoring to reproduce the matured conclusions of the Convention itself.[68] And not less certain is it that he was thus notifying those to whom the Constitution had been referred for ratification the grounds upon which its framers and supporters based the case for judicial review.

V.

Our demonstration, however, of the views of the framers with reference to the basis of judicial review may also be profitably extended to the period between the adoption of the Constitution and the decision in *Marbury* v. *Madison*. For this was the period

[67] Cf. sections 9 and 10 of Art. I.

[68] Note also the words of James Wilson in his "Lectures" (1792), where he presents judicial review as "the necessary result of the distribution of power made by the Constitution between the legislative and the judicial departments": Works (Andrews' Ed.), I, 416-7.

when the new system was set going, not only in the light of the views of its authors, but for the most part under their personal supervision. But the interest of the period also arises in part from the real paradox which judicial review has always presented in our system from the outset, the paradox namely of trying to keep a government based on public opinion within the metes and bounds of a formally unchangeable law. The dilemma thus created did not at first press, but with the rise of political opposition it became grave enough, and when this opposition finally triumphed, not only judicial review but even judicial independence was for the moment in peril.

But, indeed, the difficulty at the time of the adoption of the Constitution was hardly a new one, for some such objection had been forthcoming even earlier to judicial review within the States, where, however, the judges were generally much less secure of independence than under the United States Constitution, [68a] and where, moreover, judicial power in the last resort often resided still with a branch of the legislature or with the whole of it. Furthermore, as I have already indicated, judicial review in the States had thus far rested upon a somewhat uncertain logic which put it in the light of a highly extraordinary, quasi-revolutionary remedy, or in best gave it sway within the limited area marking the intersection, so to speak, of the written constitution with certain fundamental principles of the Common Law, like trial by jury or the security of vested rights.

It is not surprising, therefore, to find HAMILTON turning from his work of planting judicial review squarely within the Constitution and of rendering its field of operation co-extensive with the four corners of that instrument, to consider certain objections. Thus he recites: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous.... The Parliament of Great Britain and the legislatures of the several States can at any time rectify by law the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." HAM-

ILTON met these objections by denying that by the principle of separation of powers even a State legislature could reverse a judgment, and also by pointing to the power of impeachment.[69]

MADISON, on the other hand, responded—characteristically—to the views of the alarmists more pronouncedly. On the floor of the Convention, as we have just seen, he had espoused the doctrine of judicial review in unmistakable terms. Again in the FEDERALIST he had described the Supreme Court as the tribunal which was "ultimately to decide" the questions that would necessarily arise between the State and national jurisdictions.[70] And in the Virginia convention his point of view had still been the same: the National Government was to be the final judge of its own powers through the Supreme Court.[71] Yet within six months he was writing a correspondent in Kentucky that neither the federal nor State constitutions made any provision "for the case of a disagreement in expounding them" and that the attempt of the courts to stamp a law "with its final characer" "by refusing or not refusing to execute it" made "the judicial department paramount in fact to the legislative, which was never intended and can never be proper."[72]

Still MADISON was reluctant to abandon judicial review outright. What he really desired was a principle which, while saving to judicial interpretations of the Constitution their finality in certain instances, in others clad those of Congress with a like finality. He soon had an opportunity to attempt the formulation of such a principle. The bill introduced into the first Congress creating the Department of Foreign Affairs contained the clause, with reference to the Secretary of State, "to be removable from office by the President of the United States." The clause was at once attacked by SMITH of South Carolina in the following words: "What authority has this house to explain the law? .... Sir, it is the duty of the legislature to make laws; your judges are to expound them." MADISON sprang to the defense of the clause.

[68a] See Annals of Congress, I, col. 844.

[69] Federalist No. 81.

[70] No. 39.

[71] Elliot, III, 484-5.

[72] Note 35, *supra*. Madison, like many other Virginians of prominence, was angered at this time by the rather pedantic attitude taken by the State court of appeals toward an act of the legislature imposing new duties on them without increasing their salaries. See the Case of the Judges, 4 Call. 139, ff'g (1788). The case gave rise to a vigorous debate in the Virginia assembly. See Monroe to Madison, Nov. 22, 1788: "Letters to Madison," MSS., Library of Congress.

He admitted that it represented an attempt by Congress to construe the Constitution *finally* at the point involved, but he asserted that it was within Congress' power to do this very thing in a case where the Constitution was silent and the question raised concerned an apportionment of power among departments. In other words an assumed incompleteness at points was to give Congress its opportunity. But, rejoined GERRY of Massachusetts, "I would ask, gentlemen, if the Constitution has given us the power to make declaratory acts, where is the necessity of inserting the Fifth Article for the purpose of obtaining amendments? The word amendmend implies a defect, a declaratory act conceives one. Where then is the difference between an amendment and a declaratory act?" The protest against an "attempt to construe the Constitution" was also voiced by SHERMAN of Connecticut, PAGE and WHITE of Virginia, and BENSON of New York, with the result that eventually MADISON himself joined in support of a motion striking out the exceptionable clause and substituting for it phraseology merely inferring that the President would exercise the power of removal and making provision for the event.[73] A little later the House passed the Judiciary Act almost without comment upon the 25th section of it, which recognizes the judicial prerogative in relation to the written constitution in the most explicit fashon.[74]

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[73] For this debate, see Annals of Congress, I, col. 473 ff'g.

[74] Professor Beard in his Supreme Court, etc., assumes that all who voted for the act of 1789 favored judicial review in 1787. The argument has little independent force, for judicial review was a rapidly spreading idea during this period. On the floor of the Convention itself there were several converts. Read, for example, in this connection the exact statements of Gerry, Wilson, and Dickinson, as reported by Madison. Compare Dickinson in his "Letters of Fabius." Compare Morris' words in 1785: Sparks, Life of Gouverneur Morris, III, 438. Also, the list is incomplete. Perfected, it would include the following names of those who attended the Philadelphia Convention and supported the Act of 1789: Ellsworth, Paterson, Strong, Bassett, and Few—all of whom were on the Senate Committee that drafted the act; Robert Morris and Read, also Senators; and Madison, Baldwin, and Sherman in the House. Mr. Horace Davis in the November Am. Polit. Sc. Rev. seeks to prove, on the other hand, that those who supported the Act of 1789 thereby showed that they did not believe in the power of the Supreme Court to pass upon the validity of acts of Congress, except as the question was raised in cases coming up from the State courts. If Mr. Davis had turned to the debate, just reviewed, on the establishment of the Department of Foreign Affairs, he would have found at least half a dozen men championing the notion of judicial review who later voted for the Act of 1789. Also, I should like to ask where the State courts get their power to pass on the validity of acts of Congress save as it is intrinsic to judicial power under a constitution regarded as law. Mr. Davis' error consists apparently in the assumption that Congress, in the 25th section of the Act of 1789, conferred power upon the Supreme Court that it would not otherwise have had, instead of, as is the fact, organizing a particular branch of "the judicial power of the United States." For some later references in Congress to judicial review, see Annals, II, cols. 1978, 1988.

From this time on for nearly a decade the legalistic view of the Constitution passed substantially without challenge. It is true that when in the first *Hayburn* case the judges of the Middle Circuit refused to enforce the Pension Act of 1792 on the ground of its unconstitutionality, some "high-flyers in aud out of Congress" raised the cry of impeachment; but they were speedily silenced. Upon the objections of the judges to the act being filed with the President, the latter forwarded them to Congress, which proceeded promptly to bring the act into conformity with the judicial view of constitutional requirements.[75] Four years later occurred the case of *United States* v. *Hylton*,[76] which is instructive of the established doctrine in a number of ways. The only question argued before the court was that of the constitutionality of the act of Congress involved. In the argument for the United States, the Attorney General was assisted by Alexander HAMILTON, for whose services Congress appropriated a special fund. Neither side challenged the power of the court in the premises.[77] The court's decision upholding the act was based purely upon the merits of the case. MADISON was plainly disappointed at the court's not disallowing the act.[78]

[75] The materials for this account of the "Pension Case" are drawn from 2 Dall. 409; Am. St. Papers, Misc. I, 49-52; Annals of Cong., III, cols. 556-7; Annals of Cong., XI (7th Cong., 1st sess'n), cols. 921-5; U. S. v. Ferreira, 13 How. 40 (note). The statement with reference to the threat of impeachment is based on the following extract from Bache's General Advertiser (Camden, N. J.) for Apr. 20, 1792:

"Never was the word 'impeachment' so hackneyed as it has been since the spirited sentence passed by our judges on an unconstitutional law. The high fliers, in and out of Congress, and the very humblest of their humble retainers, talk of nothing but impeachment! impeachment! impeachment! as if forsooth Congress were wrapped up in the cloak of infallibility, which has been torn from the shoulders of the Pope; and that it was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calf skin! But if a Secretary of War can suspend or reverse the decision of the Circuit Judges, why may not a drill sergeant or a black drummer reverse the decisions of a jury? Why not abolish at once all our Courts, except the court martial? and burn all our laws, except the articles of war? * * * ."

"But when those impeachment mongers are asked how any law is to be declared unconstitutional, they tell us that nothing less than a general convention is adequate to pass sentence on it; as if a general convention could be assembled with as much ease as a party of stock jobbers."

I am indebted for this extract to my friend, Mr. W. S. Carpenter, who is preparing a volume on Judicial Tenure in the United States.

[76] 3 Dall. 171 (1796).

[77] Annals, XI, cols. 925-6.

[78] It was also during this period that, in 1793, the Supreme Court refused Washington's request to advise him with reference to the operation of the treaties of 1778 with France, basing its refusal upon the strictly judicial character of their office: Baldwin, American Judiciary, 33. In the debate on the Department of Foreign Affairs in 1789, Gerry had expressed the idea that the President could require opinions of the judges on constitutional questions and that these would be binding on Congress: loc. cit. col. 524.

And meantime, judicial review was also advancing within the States, and what is an even more significant development, was being transferred from the earlier basis of fundamental principles to the written constitution. Two illustrative cases are *Bowman* v. *Middleton,*[79] and *Kamper* v. *Hawkins.*[80] In the former, decided in 1789, the South Carolina supreme court pronounced an early colonial statute to have been void *ab initio* as contrary to "common right" and "Magna Charta." In the latter, four years later, the Virginia court of appeals pronounced an act of the State legislature void as in conflict with the letter and spirit of the Virginia constitution, which was described as an ordinance of the people themselves and therefore superior to an ordinary statute, but as nonetheless a source of rules determinative of the rights of individuals.[81]

One thing that retarded the growth of judicial review in the States was the continuing influence of BLACKSTONE, with his notions of Parliamentary sovereignty,[82] but a more potent factor was the retention of the doctrine that legislative power extended to the interpretation of the standing law. Thus as late as 1798 we find Justice CHASE of the United States Supreme Court declaring that only in the Massachusetts constitution were the *powers* of government *distributed;* and two years later the same judge announced his opinion that the mere statement of the general principle of the separation of powers in a State constitution did not serve to restrict the legislative powers, that such general principles were "not to be regarded as rules to fetter and control, but as matter merely declaratory and directory."[83] But in *Ogden* v. *Witherspoon,*[84] which was a

[79] 1 Bay (S. C.) 93.

[80] Va. Cases, 20.

[81] Note J. Nelson's words, p. 131 of the volume: For the legislature to decide whether its own act is void or not would be unconstitutional, "since to decide whether the plaintiff of defendant under the existing law have a right is a judicial act."

[82] For an illustration of the Blackstonian influence, see Zephaniah Swift, The System of Laws of Connecticut (1795), pp. 16-7, 34-5, 52-3. Also, in the same connection, see arguments of attorneys in 4 Halstead (N. J.) 427 and 1 Binney (Pa.) 416. For a decidedly disingenuous and somewhat amusing attempt to explain Blackstone's words away, see Works of James Wilson (Andrews' Ed.), II, 415. Note also, Marshall's words, as attorney in Ware v. Hylton, 3 Dall. 199, 211: "The judicial authority have no right to question the validity of a law unless such a jurisdiction is given expressly by the Constitution."

[83] The cases referred to are Calder v. Bull, 3 Dall. 386, and Cooper v. Telfair, 4 Dall. 13. Justice Chase indicates by his remarks in these cases, significantly, reluctance to admit judicial review save on the basis of natural rights and the social compact. His remarks in the latter case, however, contain interesting testimony as to the unanimity of opinion on the subject among bench and bar, both in 1800 and at the time of the adoption of the Constitution.

[84] 3 N. C. 404(1802).

North Carolina case falling within federal jurisdiction because of the diverse citizenship of the parties to it, and in which therefore the federal court stood in the same relation to the State constitution that the State court would have, Chief Justice MARSHALL on circuit reversed this position; and in *Ogden* v. *Blackledge*[85] the Supreme Court itself sustained his course. In the latter case the question at issue was whether a North Carolina statute of limitations, passed in 1715, had been repealed in 1789, the State legislature having declared in 1799 that it had not been. Said attorneys for plaintiff: "To declare what the law is or has been is a judicial power, to declare what it shall be is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial." The court stopped counsel and decided that, "under all the circumstances stated, the act in question had been repealed in 1789." The service thus rendered to the cause of judicial review under the State constitutions by the federal courts acting in their vicarious capacity cannot be overestimated. By 1820, the spread of the legalistic interpretation of the principle of the separation of powers had effected the establishment of judicial review on the basis of the written constitution in every State in the Union save only Rhode Island, which exception moreover only proves the rule, since it is explained by the fact that till 1842 Rhode Island continued its colonial charter as a constitution and that by this instrument legislative power remained undefined.[86]

VI.

It thus becomes apparent once more that judicial review in all its branches rests upon a common basis, that its cause in one jurisdiction is its cause in all. The reflection becomes especially pertinent as we turn to consider the challenge made to the finality of

[85] 2 Cr. 272 (1805).

[86] By 1803, the following States had either been definitely committed to the doctrine of judicial review by judicial decision or practically so by judicial dicta: North Carolina (1787), South Carolina (1792), Virginia (1788, 1793), Pennsylvania (1793, 1799), New Jersey (1796), Kentucky (1801), Maryland (1802). The Kentucky Constitution of 1792, Art. XII, p. 28, says: "All laws contrary * * * to this Constitution shall be void." Prof. Thayer, in an article in 7 Harvard Law Rev., 129 ffg., contended that this article specifically authorized judicial review; but the Pennsylvania constitution of 1776 and the Massachusetts constitution of 1780 contained equivalent provisions without producing judicial review. See a valuable list of cases in Prof. Haines' volume, pp. 90 ffg. Also, the opinion of the judges of the Pennsylvania Supreme Court of Dec. 22, 1790, to Gov. Mifflin, holding that certain offices had been vacated by the new

the Supreme Court's interpretation of the Constitution in relation to acts of Congress by JEFFERSON and his more radical followers in the years 1798-1802. For it was in part at least some such understanding that accounts for the entire failure of this challenge even while its authors were borne into higher office by an overwhelming political triumph.

The debate and vote on the Judiciary Act of 1789 prove that originally the advocates of State rights—for they existed from the beginning—were nothing loath to accept the Supreme Court's view of the Constitution as final, both in relation to national and to State power. When, however, the federal judges showed themselves disposed to uphold and enforce the Alien and Sedition Laws of 1798, and some of them indeed to entertain prosecutions for sedition under a supposed Common Law of the United States, the State-rights champions began to appreciate for the first time the added sanction given to national authority by judicial decision. The Virginia and Kentucky Resolutions of 1798 and 1799 were framed primarily with the design of breaking through this subtle control, on the warrant of the propositions, first that the Constitution was a compact of sovereign States and, second, that the organ of sovereignty within a State was its legislature, from which propositions the conclusion was drawn that the final word in construing the national Constitution lay with the individual State legislatures.[87] But the final outcome of the propaganda thus undertaken was not merely a further vindication of the prerogative of the Supreme Court of the United States, but of *all* courts. Thus having been forwarded to the other legislatures, the resolutions elicited from the seven Northern of them unequivocal declarations of the right of the "Supreme Court of the United States ultimately" to decide "on the constitutionality of any act" of Congress.[88] In his famous Report of 1799 to the Virginia legislature, MADISON endeavored at first to meet these responses by reiterating the doctrine of the original resolutions, but even in so doing he admitted the finality of judicial constructions of the Constitution as against the *other* branches of the National Government, and in the end he abandoned his case completely.[89] The Resolutions, he contended, taking a defensive tone,

Constitution, is worth notice. The ground of the opinion is indicated by the following words: "We think the Constitution to be paramount [to] the acts of the legislature": Pa. Archives, 1st ser., XII, 36.

[87] MacDonald, Select Documents, 148-60; Elliot, IV., 528-32, 540-45.

[88] H. V. Ames, State Documents on Federal Relations, 16-26.

[89] Writings (Hunt's Ed.), VI, 341-406.

were entirely proper, since they were designed merely "to excite reflection," whereas, he added, decisions of the judiciary, *"are carried into immediate effect by force."* It would be hard to imagine a more complete retreat. The probability is that he and those for whom he spoke had begun to realize that to make the State legislature the final interpreter of the National Constitution was also to make it the final interpreter of the State constitution, which in turn meant either the setting up of a legally uncontrolled power within the State itself or—what *practically* would have been the same thing—return to the idea now rapidly becoming obsolete of a legislative function of *jus dicere*.

Two years later, nevertheless, the question of the finality of the judicial view of the Constitution was again to the front, though on a somewhat altered footing. By the election of 1800 the Republicans had captured the Presidency and both Houses of Congress, but the judiciary still withstood them. Now, at the very moment of retiring from power the Federalists proceeded by the Act of February, 1801, substantially to double the number of inferior federal courts, while President ADAMS at once set to work, with the cooperation of the Senate, to fill the newly created offices with Federalists. The federal judiciary, exclaimed RANDOLPH wrathfully, has become "a hospital of decayed politicians!" JEFFERSON'S concern went deeper. Writing DICKINSON he said: "They have retired into the judiciary, from which stronghold they will batter down all the works of Republicanism."

Naturally the first step attempted was the repeal of the Act of 1801, but from the point of view of a possible larger program of definitely subordinating the judiciary to the political branches of the government, the repeal voted was indeed a Pyrrhic victory.[90] In the debate on the question the Federalists speedily developed the argument that, inasmuch as the Constitution designed the judiciary to act as a check upon Congress, the latter was under constitutional obligation not to weaken the independence of the former in any way. To meet this argument BRECKENRIDGE of Kentucky, the Republican leader in the Senate—and one of the authors of the Kentucky Resolutions—brought forward for the first time the theory of the equal right of the three departments, when acting within their respective fields, to construe the Constitution for

[90] Jefferson and Giles were originally of the opinion that the act was irrepealable. They were converted to their later view by the dialectics of John Taylor of Caroline. These statements are based on documents from the Breckenridge MSS. which are given in Mr. W. S. Carpenter's thesis on Judicial Tenure in the United States.

themselves, and from it deduced the exclusive right of the legislature "to interpret the Constitution in what regards the law-making power" and the obligation of the judges "to execute what laws they make." In other words, the notion of a departmental right of constitutional construction takes its rise not from the effort to establish judicial review but from an attempt to overthrow it. But the feeble disguise which this doctrine affords legislative sovereignty made it little attractive even to Republicans, who for the most part either plainly indicated their adherence to the legalistic view of the Constitution, or following a hint by GILES of Virginia, kept silent on the subject. The Federalists on the other hand were unanimous on the main question, though of divergent opinions as to the grounds on which judicial review was to be legally based, some grounding it on the "arising" and "pursuant" clauses, some on the precedents of the *Pension* and *Carriage* cases, some on the nature of the Constitution and of the judicial office, some on "the contemporary use of terms" and "the undisputed practice under the Constitution" "of all constitutional authorities." And undoubtedly, at this date, all these grounds were fairly available save the first. For the rest, said the Federalist orators, judicial review was expedient, since the judiciary had control of neither the purse nor the sword; it was the substitute offered by political wisdom for the destructive right of revolution; "to have established this principle of constitutional security," "a novelty in the history of nations," was "the peculiar glory of the American people;" the contrary doctrine was "monstrous and unheard of."[91]

[91] Annals of Cong., XI, cols. 26-184 (Senate), cols. 510-985 (House). Breckenridge of Kentucky did not at first attack judicial review, loc. cit. 92-9; but was finally prodded to it, ib. 178-80. In the Senate two advocates of repeal attacked judicial review (Breckenridge and Stone of North Carolina), while two (Jackson of Georgia and Wright of Maryland) accepted it. In the House, three advocates of repeal attacked judicial review (Randolph of Virginia, Williams of North Carolina, and Thompson of Virginia); two endeavored to discover a compromise position, along the line of the doctrine of departmental equality (Davis of Kentucky and Bacon of Massachusetts); but five, impliedly at least, accepted judicial review without making such qualifications (Smith of Vermont, Nicholson of Maryland, Gregg of Pennsylvania, Holland of North Carolina, and Varnum of Massachusetts). Their remarks can be easily located through the Index. Those of Randolph and Bacon are most instructive. In the Senate, seven opponents of repeal championed judicial review (see, especially, the speeches of Morris of New York, and Chipman of Vermont). In the House, fifteen of the same party performed this service. The remarks quoted in the text are from the speeches of Stanly and Henderson of North Carolina, Rutledge of South Carolina, and Dana of Connecticut: Cols. 529-30, 542-3, 574-6, 754-5, 920, 932. Other notable speeches were those of Goddard and Griswold of Connecticut, and Hemphill of Pennsylvania. Giles' case is interesting. In the debate on the first Bank, 1791, he had answered an argument in behalf of the proposition, that was drawn from the fact that the Congress of the Confederacy had chartered "the Bank of North America" thus: "The act itself was never confirmed by a

A few months later occurred the decision in *Marbury* v. *Madison,* which against this background assumes its true color. Yet MARSHALL'S performance is by no means to be regarded as a work of supererogation. In the first place, vested as it was with the apparent authority of a judicial decision, it brought to an end a discussion which, for all that it had been highly favorable to judicial review, might in the end have proved unsettling. Again, it threw the emphasis once more upon the great essential considerations of the character of the Constitution, as "fundamental and paramount law" and "the province and duty of the judicial department to say what the law is." Finally, in the very process of vindicating judicial review, it admitted to a degree the principle that had thus far been contended for only by opponents of judicial review. Thus, discussing the amenability of the President and his agents to mandamus, the Chief Justice says: "By the Constitution of the United States the President is vested with certain important political powers in the exercise of which he is to use his own discretion and is accountable only to his country in his political character and to his own conscience."[92] Later of course, this doctrine, which we may call the doctrine of *departmental discretion,* was supplemented by the doctrine that the powers of Congress must be liberally construed,[93] and later still by the doctrine of the immunity of the President from judicial process.[94] The first two of these doctrines at least may be readily harmonized with the theory of judicial review. At the same time, they are not constrained by that theory, but are plainly concessions to the necessity of making the Constitution flexible and adaptable while still keeping it legal. They prove therefore that "the spirit of accommodation" with which Professor MCLAUGHLIN credits the political departments has been met by a similar spirit on the part of the judiciary.

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At the outset of this paper I raised the question of the legal basis of judicial review. The answer to this question I have already reiterated more than once. The legal basis of judicial review is supplied by the view of the constitution as law enforceable by the courts, which is verbally recognized by the national Consti-

judicial decision." In other words, adjudication is made the final test of constitutionality. But in 1804, we find him holding that Congress might impeach a judge for declaring one of its acts unconstitutional: J. Q. Adams. Memoirs, I, 321 ff'g.

[92] 1 Cr. 165-6.

[93] McCulloch v. Md., 4 Wheat. 316 (1819).

[94] Miss. v. Johnson, 4 Wall. 475 (1867).

tution, and by that view of the principle of the separation of powers which sharply distinguishes law-making from law-interpreting and assigns the latter exclusively to the courts, the view which was demonstrably held by the framers of the Constitution when they drafted Article III. But in the last analysis judicial review rests upon the assumption, hardly concealed by this interpretation of the principle of the separation of powers, that the judges alone really *know* the law. To a generation born and bred under the *regime* of the Common Law this was a natural assumption to make. Today, however, the activity of the legislatures in the field of social reform imparts to the law more and more the character of an assertion of authority, with the result that the possibility of a purely mechanical interpretation of it comes to be denied.[95] At the same time, with the rise of administrative bodies, the courts are losing the role which once was theirs almost exclusively, of mediating between the state and the individual, with the result that men today find it requisite to look to them for their rights less frequently than in the past. On both these accounts the theoretical argument for judicial review tends to lose touch with the nourishing earth of solid facts and congenial ideas, and its peruasiveness to weaken. But on the other hand it is by no means certain that this will always be the case. The doctrine of Due Process of Law, while it has enlarged the scope of judicial review enormously, has also rendered it correspondingly flexible. Granting the judges due wisdom, there is today no good reason why the aegis of the constitution may not be thrown about almost any sensible measure of social reform, to give it legal stability. Who can doubt, then, that history will repeat itself, and that the muck-rakers of today will become the stand-patters of tomorrow?

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[95] See especially John Chipman Gray's Nature and Sources of the Law.